IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1115

In the Matter of the Petition of
ROBERT M. LALLI,
Appellant,
to compel
ROSAMOND I LLI, as Administratrix of
the Estat of Mario Lalli, Deceased,
Appellee,
to rend r and settle her account
as Administratrix.

BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY AND LEGAL SERVICES FOR THE ELDERLY POOR IN SUPPORT OF APPELLANT.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT, AND STATEMENT OF INTEREST OF THE AMICI

The Legal Aid Society of New York City and Legal Services for the Elderly Poor respectfully move this Court, pursuant to Rule 42 of the Rules of the Supreme Court, for permission to file the attached brief amicus curiae in support of the appellant Robert M. Lalli, by reason of the amici's substantial interest in the outcome of this case and their considerable experience in litigation concerning the evidentiary and constitutional issues presented herein.

1. Movant The Legal Aid Society is a private non-profit organization incorporated under the laws of the State of New York for the purpose of rendering legal representation and assistance without cost to persons in New York City who are without adequate means to employ other counsel.

2. This appeal presents a constitutional question of far-reaching and fundamental importance to large numbers of the indigent persons in New York City whom it is the Society's purpose to serve, namely, the question of the constitutional rights of illegitimate children to inherit from their fathers by intestate succession.

3. The client population of the Civil Division of The Legal Aid Society includes substantial numbers of persons who die intestate and their illegitimate offspring, and the constitutional question involved in this case is of great importance to illegitimate children who are concerned with establishing paternity so that they can inherit from their father's estates. As lawyers for the City's poor, The Legal Aid Society has long concerned itself with advancing,

in every appropriate forum, the legal rights of its clients. The Society's lawyers have considerable experience with the kinds of constitutional issues which are presented here, and, specifically, have substantial knowledge and experience concerning modes and methods of proof of paternity in the context which is at issue in the instant appeal.

4. Movant Legal Services for the Elderly Poor is funded by the Legal Services Corporation through Community Action for Legal Services and the United States Department of Health, Education and Welfare to provide assistance on research and litigation to lawyers dealing with the problems of the elderly. One of the many areas of concern to the elderly is estates and inheritance rights. Because the vast majority of the elderly poor die intestate, the laws governing

intestate succession are of concern to Legal Services for the Elderly Poor. The poor not only frequently die intestate, but also have only limited access to legal advice that could help them to know and understand, and therefore come within the terms of, the laws of intestate succession.

5. The constitutional question raised by the instant appeal, concerning the rights of illegitimate children to inherit from their fathers in intestacy, is one of central concern to Legal Services for the Elderly Poor in its efforts to fully assist in the litigation of issues that affect the poor. Attorneys with Legal Services for the Elderly Poor, in their experience with that office and in prior experience in other legal services organizations, have represented illegitimate children before this Court

in Jiminez v. Weinberger, 417 U.S. 628 (1974), and Trimble v. Gordon, 430 U.S. 762 (1977).

6. Movants The Legal Aid Society of New York City and Legal Services for the Elderly Poor were permitted to file a joint amicus curiae brief to the New York Court of Appeals upon its reconsideration of this case following its earlier remand from this Court.

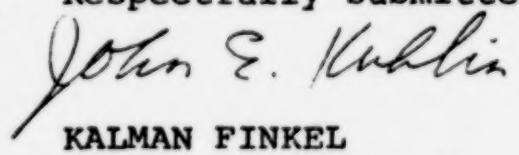
7. Movants have an obvious and immediate interest in the issue before this Court on this appeal. Counsel for appellant has consented to the filing of this brief amicus curiae. This motion is filed because counsel for the Attorney General of New York State, one of the appellees, has refused consent.

WHEREFORE, movants pray that the attached brief amicus curiae be per-

mitted to be filed with the Court.

Dated: New York, New York
May 1, 1978

Respectfully submitted,



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STATEMENT OF THE CASE

This case concerns the constitutionality, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, of New York Estates, Powers and Trusts Law (EPTL) section 4-1.2(a) in allowing illegitimate children to inherit by intestate succession from their mothers but not from their fathers, unless there has been a formal adjudication declaring paternity in a filiation proceeding instituted during the pregnancy of the mother or within two years from the birth of the child. More specifically, the question presented here is whether the State of New York may constitutionally refuse the appellant illegitimate child, Robert Lalli, inheritance from his natural father by intestate succession when it is undisputed that the appellant is the natural son of the

decedent, and that the decedent had participated in the baptism of the appellant as his father, provided financial support for appellant during his lifetime, orally acknowledged appellant as his own, and acknowledged that appellant was his son in a writing sworn to before a notary at the time he provided written parental consent for appellant's marriage.

In August, 1974, following the death of his father by homicide and the appointment of decedent's wife -- the appellee Rosamund Lalli -- as administratrix of his father's estate, appellant sought to compel a compulsory accounting by appellee-administratrix. The motion of the appellee-administratrix to dismiss the appellant's application was granted by the Surrogate's Court, Westchester County, on the ground that the appellant was not a distributee

under EPTL 4-1.2(a)(2). On direct appeal to the New York Court of Appeals that decision was affirmed, the Court finding no constitutional infirmities in EPTL 4-1.2(a). 38 N.Y.2d 77 (1975). On appeal to this Court, the judgment of the Court of Appeals was vacated and the case was remanded for further consideration in light of Trimble v. Gordon, 430 U.S. 762 (1977). On reconsideration, the New York Court of Appeals, with two judges dissenting, adhered to its previous decision (43 N.Y.2d 65), and this appeal followed.

SUMMARY OF ARGUMENT

In adhering to its prior decision adverse to the appellant herein, the majority of the New York Court of Appeals disregarded the constitutional principle announced by this Court in Trimble v. Gordon, 430 U.S. 762 (1977), that forms of proof of paternity which are not im-

precise and unduly burdensome, and in particular formal acknowledgment of paternity, must constitutionally be allowed by the state in proceedings to determine an illegitimate child's right to inherit from his deceased father by intestate succession. The effect of New York EPTL 4-1.2(a) in foreclosing consideration in such proceedings of written acknowledgment and other forms of proof of paternity which are commonly accepted in the courts of New York State violates the underlying principles of Trimble and as well amounts to unconstitutional sex discrimination.

ARGUMENT

IN A PROCEEDING TO ESTABLISH THE RIGHT OF AN ILLEGITIMATE CHILD TO INHERIT FROM HIS FATHER BY INTESTATE SUCCESSION, THE STATE OF NEW YORK CANNOT CONSTITUTIONALLY BAR CONSIDERATION OF ANY FORM OF PROOF OF PATERNITY WHICH IS NOT IMPRECISE AND UNDULY BURDENSOME, INCLUDING THE FULLY ADEQUATE AND UNDISPUTED PROOF PRESENTED BY THE APPELLANT.

A. Introduction

When viewed in light of the controlling constitutional principles set forth by this Court last Term in Trimble v. Gordon, 430 U.S. 762, 52 L.Ed.2d 31, the discrimination against illegitimate children in the distribution of the assets of their fathers who die intestate which is contained in New York EPTL 4-1.2(a) cannot withstand scrutiny under the requirements of the Equal Protection Clause of the Fourteenth Amendment. These important and controlling constitutional principles were largely ignored by the majority of the New York Court of Appeals in adhering to a decision adverse to the appellant on its reconsideration of this case.

In Trimble this Court stated that Labine v. Vincent, 401 U.S. 532 (1971), its "force as a precedent"

having been "limited" by "subsequent cases" (52 L.Ed.2d at 37 n.12), no longer constituted good authority for sustaining the constitutionality of statutory classifications affecting the distribution of assets upon death and based upon the status of illegitimacy. This Court concluded that such statutory classifications must henceforth be "examined ... more critically" for the strength of their relationship to legitimate and actual state purposes (52 L.Ed.2d at 37, 43 n.17). The Court further confirmed that a "State's purported interest in 'the promotion of [legitimate] family relationships'" cannot sustain the constitutionality of discrimination against illegitimates, since "we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children

born of their illegitimate relationships." 52 L.Ed.2d at 38-9. This Court also rejected the argument that statutes discriminating against illegitimate children in inheritance by intestate succession can be upheld on the theory that they mirror the presumed intentions of the citizens of the State regarding the disposition of their property at death: "[a]t least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of 'presumed intent.'" (52 L.Ed. 2d at 42 n.16). Trimble also held that the mere fact that the decedents whose estates are involved could avoid the statutory barrier to their illegitimate children's inheritance by writing a will to provide for them is without constitutional significance and cannot

justify the statutory exclusion (52 L.Ed.2d at 41-2).[1]

---

1. This Court's application in Trimble, to illegitimacy discrimination in the laws of intestate succession, of the principles and level of constitutional scrutiny that it had earlier applied to such discrimination in wrongful death actions (Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guaranty and Liability Insurance Co., 391 U.S. 73 (1968)), workmen's compensation benefits (Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972)), and social security benefits (Jiminez v. Weinberger, 417 U.S. 628 (1974); Mathews v. Lucas, 427 U.S. 495 (1976)) vitiates the distinction earlier made by the Court below between "benefits and rights," on the one hand, and an "inchoate expectancy," on the other. Matter of Lalli, 38 N.Y.2d at 80-81. That distinction was grounded, at least in part, on this Court's earlier, now repudiated, divergence in Labine v. Vincent, 401 U.S. 532 (1971), from its general constitutional treatment of illegitimacy cases.

The central constitutional ruling of this Court in Trimble, and the principle which controls the outcome of the instant appeal, is that state statutes discriminating against illegitimate children in the area of intestate succession can pass constitutional muster under the Equal Protection Clause only if they are "carefully tuned to alternative considerations," so as to allow these illegitimate children the right to offer the courts any kind of evidence of paternity which the State cannot demonstrate to be "imprecise and unduly burdensome" (52 L.Ed.2d at 40-41, 41 n.14). This Court made it unmistakably clear that its holding in Trimble condemns the State's elimination of any form of proof of paternity which the State fails to demonstrate is "imprecise and unduly burdensome"

in light of the State's objective of "assuring accuracy and efficiency in the disposition of property at death" (52 L.Ed.2d at 40-41, 41 n.14). "[P]rior adjudication or formal acknowledgment of paternity," the Court held, are among the forms of proof which are "clearly" not "imprecise and unduly burdensome methods of establishing paternity" (52 L.Ed.2d at 41 n.14), and hence constitutionally must be accepted by the State in proof of paternity.

B. EPTL 4-1.2(a) Constitutes Unconstitutional Discrimination Against Illegitimate Children.

In adhering to its prior determination following this Court's remand of this case for reconsideration in light of Trimble, the majority of the New York Court of Appeals patently ignored the guiding constitutional principles enunciated by this Court in that case. Instead, in an opinion

bereft of careful analysis of the full meaning of the Trimble decision, the majority below summarily concluded that "our statute meets the constitutional guidelines articulated in Trimble" (43 N.Y.2d at 70). The majority utterly ignored its obligation under Trimble to delineate the boundaries of the types of proof of paternity which must constitutionally be considered in an intestacy proceeding, and abruptly dismissed the statement at footnote 14 of the Trimble decision which specifically included formal acknowledgments of paternity among those clearly acceptable forms of proof of paternity which a state must constitutionally allow.

As the dissenting judges in the court below correctly observed, the majority's facile distortion of the plain meaning of the Trimble de-

cision was plainly in error. Dissenting Judges Cooke and Fuchsberg prefaced their conclusion that the discrimination against illegitimate children enacted by EPTL 4.1-2(a) is unconstitutional with a careful and considered identification of the constitutional principles underlying and flowing from the Trimble decision. Thus Judge Cooke, quoting from Trimble, accurately identified this Court's requirement in that case that categories of illegitimate children whose "'inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws'" cannot constitutionally be excluded "'unnecessarily'" and that the applicable state statute must take account of the "'possibility of a middle ground'" in order

to accommodate those categories of illegitimate children. 43 N.Y.2d at 70-71. Judge Cooke then correctly concluded that the challenged New York statute fails to consider middle ground or alternative solutions, and as a consequence produces anomalous and inconsistent results that often work a severe injustice:

> A judicial proceeding may promote accuracy, but the difficulties in otherwise establishing paternity do not justify the narrow confines and procedure mandated by our statute. The requirement of an order of filiation made during the lifetime of the father will, ipso facto, exclude a substantial category of illegitimate children from inheritance. If this exclusion resulted from a lack of proof, it might be justifiable. But in reality not obtaining an order of filiation will often simply result from the fact that the putative father is supporting and acknowledging the children as his own. Or, it might well be and often is the product of

> carelessness or ignorance on the part of those who might institute a proceeding within the statutory limitation, for neither of which should a child suffer. Indeed, ordinarily the order will be obtained only where the natural father is not providing support. The children who are voluntarily supported, no matter how compelling the proof, will be absolutely barred if such an order is not obtained.
>
> The question of paternity is a delicate one. Even though the putative father may petition for the order (see Family Court Act, Section 522), this is a burdensome procedure. To require an order of filiation during the lifetime of the father is to demand, at least in eyes of laymen, a form of adversary proceeding. The instant matter is illustrative. The natural father was supporting petitioners, and had made an acknowledgment of his parenthood as to one of them. In this instance the only purpose served by an order of filiation would be to satisfy a requirement which may have provoked disharmony and which goes beyond what is necessary in these circumstances. To be sure, the State may desire this method of proof, but this is an extreme requirement

> in view of the consequences. The State may impose a heavy burden, but the statutory procedure required has only a tenuous relation to the quantum of proof demanded. Viewed in proper perspective, it is apparent that the statute places an undue, if not unyielding, burden on those concerned, and thus in light of Trimble it must be concluded that the statute leaves the "middle ground" of what a state may legitimately require and settles on the side of complete exclusion.

43 N.Y.2d at 71-72.

As the dissent reflects, no greater anomaly or more severe injustice flowing from the application of EPTL 4.1-2 (a) can be imagined than that worked by its impact upon the case of the appellant Robert Lalli. Solely by reason of the extreme and restrictive terms of EPTL 4.1-2(a), appellant is denied the right to inherit by intestate succession from the man who indisputably is his natural father and whose opportunity to specifically provide by will for his son upon his death was denied him by the homicide that unexpectedly ended his life. By reason of the statutory bar appellant was not permitted to establish paternity even though he indisputably proved that the decedent participated in appellant's baptism as his father, provided financial support for appellant during his lifetime, orally acknowledged appellant as his own child, and acknowledged that appellant was his son in a writing sworn to before a notary at the time he provided written parental consent for appellant's marriage. On the facts of appellant's case, such statutory discrimination is plainly unconstitutional.

By ignoring the ruling of this Court in Trimble that a state cannot constitutionally foreclose consideration in this setting of any form of proof of paternity which is not "imprecise and unduly burdensome," the majority below chose to close its eyes to the plain fact that the courts of New York State have customarily accepted a broad range and variety of kinds of evidence as adequate and reliable forms of paternity. Such allowable forms of proof have included evidence that the father has lived together with the mother and child at various locations and an admission in a letter of the parental relationship, Anon v. Anon, 25 A.D.2d 350 (2nd Dept. 1966), aff'd. 19 N.Y.2d 840 (1967), remittitur amended, 20 N.Y.2d 742 (1967); evidence that the father has lived together with the

mother and children, supported the children and paid their school tuition, together with a signed affidavit acknowledging paternity and the claiming of a child as a dependent on an income tax return, Brown v. White, 29 A.D.2d 1054 (3rd Dept. 1968); the father's signing of a hospital authorization for the infant child, Green v. Blue, 28 A.D.2d 628 (3rd Dept. 1967); testimony that the father and child lived together, Jay o/b/o X v. Y, 48 A.D.2d 716 (3rd Dept. 1975); the father's signing of the child's report card and his writing of a letter to obtain visitation, D. v. D., 69 Misc.2d 698 (Fam.Ct. N.Y. Cty. 1972); letters containing admissions and other testimony, White v. Grey, 26 A.D.2d 972 (3rd Dept. 1966); testimony of a third party, Kiamos v. Childakis,

25 A.D.2d 647 (1st Dept. 1966); an admission, Commr. ex. rel. Hoffman v. Scholtz, 279 App. Div. 967 (1st Dept. 1952); payments of support, People v. Guley, 281 App. Div. 927 (3rd Dept. 1953); testimony of a third party, Martin v. Lane, 57 Misc. 2d 4 (Family Ct. Dutchess Cty. 1968); and a written acknowledgment on a hospital form after birth of the infant, Fitzsimmons v. DeCicco, 44 Misc.2d 307 (Family Ct. Ulster Cty. 1964).

The kinds of evidence set forth above indisputably constitute forms of proof of paternity which are already well accepted by the courts of this State. In these courts such evidence must amount to "clear and convincing" and "entirely satisfactory" proof in order to establish paternity.

Burk v. Burpo, 75 Hun 568 (1894); Commissioner ex. rel. Gallagher v. O'Keefe, 180 App. Div. 667 (2d Dept. 1917); Commissioner ex. rel. Carr v. Kotel, 256 App. Div. 352 (1st Dept. 1939); Fitzsimmons v. DeCicco, 44 Misc.2d 307 (Family Ct. Ulster Co. 1964). Thus recently, the New York Surrogate's Court in Suffolk County held that two illegitimate children were entitled to inherit intestate from their deceased father where the evidence demonstrated that the decedent supported the children and orally acknowledged them as his own, listed them as dependents on his income tax returns, and was listed as the natural father of the children on birth and baptismal certificates, school records, insurance policies, and Veterans Administration records.

Citing this Court's decision in Trimble and Judge Cooke's "strong" dissenting opinion in the instant case, the Surrogate concluded that the petitioners there "have proven by clear and convincing proof that they are indeed the children of the decedent" and he therefore permitted them to inherit. Estate of Casper Abbati, New York Law Journal, December 30, 1977, page 11, col. 6 (Surrogate's Court, Suffolk County).

Therefore, in rejecting the constitutional guidelines enunciated in Trimble, the majority below perpetuated a statute which denies intestate inheritance rights to illegitimate children who are able to adduce forms of proof of paternity which in this State plainly do not constitute "imprecise and unduly

burdensome methods of establishing paternity."[2] Trimble, 52 L.Ed.2d at 41, 41 n.14. The inevitable conclusion, then, is that such forms of proof of paternity cannot, consistent with the principles of Trimble v. Gordon and the Fourteenth Amendment's Equal Protection Clause, automatically be eliminated by the State of New York as methods of establishing paternity in proceedings in which an illegitimate child seeks to inherit from his father by intestate succession.

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2. Further, no argument could be made that the Surrogate's Court is an inappropriate forum for resolving the issue of paternity in the course of its proceedings to determine the rights of illegitimate children to inheritance in intestacy. See In re Estate of Ross, 67 Misc.2d 320 (Surrogate's Ct. Kings Cty., 1971); In re Ortiz Estate, 60 Misc.2d 303 (Surrogate's Ct. Kings Cty., 1969).

C. EPTL 4-1.2(a) Also Constitutes Unconstitutional Sex Discrimination.

As demonstrated above, EPTL 4-1.2 (a), like the Illinois statute struck down in Trimble, is unconstitutional because it irrationally discriminates against illegitimate children vis-a-vis legitimate children in determining rights to inherit from their fathers in intestacy. Thus far in this brief Amici have analyzed the results that constitutionally must flow from the invalidation of EPTL 4-1.2(a) on these grounds. These results can also be reached on the basis of an alternative constitutional approach.

Although this Court did not find it necessary to reach the issue in Trimble (52 L.Ed.2d at 36), Amici respectfully suggest that the statute in question here also constitutes unconstitutional sex discrimination, since it irrationally discriminates to an extreme degree against women who must support their illegitimate children following their fathers' deaths and against illegitimate children on the basis of the sex of the deceased parent from whom they seek to inherit by intestate succession. Under New York law, Family Court Act § 513, "[e]ach parent of a child born out of wedlock is liable for the necessary support and education of the child ..." Thus, when one parent dies, the surviving parent is solely liable to support the child. And yet, despite the clear economic disadvantage of surviving mothers (cf. Kahn v. Shevin, 416 U.S. 351, 353, 355 (1974)), EPTL 4-1.2 gives assistance to surviving fathers which it

denies to surviving mothers. Children whose mothers die can inherit from the estates of their mothers, thus potentially having funds for their support, whereas only a small proportion of children, those whose paternity has been previously adjudicated, can inherit from their fathers. The child's mother in many cases will therefore have the far more onerous task of supporting a child who has no claim against his/her father's estate, and the illegitimate child who cannot inherit from his/her father's estate will be economically disadvantaged. The New York statutory scheme discriminates against women and against their illegitimate children who cannot inherit from their fathers by failing to provide for these illegitimate children a legal right to

inheritance, without a prior Family Court paternity order, equivalent to that granted to the illegitimate children of surviving male parents. That discrimination is made especially egregious and unwarranted by the fact that an illegitimate child of a deceased mother is free to come into the New York Surrogate's Court to present all proof of his/her relationship to the mother, with no statutory restrictions, while an illegitimate child of a deceased father is not given <u>any</u> opportunity to be heard in the same Surrogate's Court unless there has been a Family Court adjudication of paternity.

Such extreme statutory discrimination against the illegitimate child and the surviving parent solely on the basis of the gender

of the decedent parent clearly cannot survive constitutional scrutiny under the standards of equal protection which are applicable to sex discrimination. That standard was recently enunciated by this Court in Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 397, 407 (1976):

> To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Thus, in Reed [v. Reed, 404 U.S. 71 (1971)] the objectives of "reducing the workload on probate courts," id., at 76, 30 L.Ed. 2d 225, 92 S.Ct. 251, and "avoiding intra-family controversy," id., at 77, 30 L.Ed.2d 225, 92 S.Ct. 251, were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of intestate administrators. Decisions following Reed similarly have rejected administrative ease and convenience as sufficiently important objectives

> to justify gender-based classification.

As Justice Powell observed in his concurring opinion in Craig, 50 L.Ed. 2d at 4141 n.*, "candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification." Plainly, EPTL 4-1.2(a) must fall under that standard for unconstitutional sex discrimination, particularly in view of the effect of the statute in allowing the illegitimate child claiming from the mother's estate to introduce any evidence of maternity while foreclosing the illegitimate child claiming from the father's estate from any opportunity to prove paternity. Compare Jiminez v. Weinberger, 417 U.S. 628 (1974), with Mathews v.

Lucas, 427 U.S. 495 (1976). See Califano v. Goldfarb, ___ U.S. ___, 51 L.Ed.2d 270 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

CONCLUSION

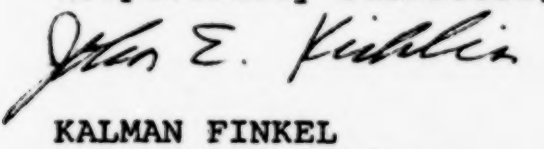
In Trimble v. Gordon, supra, this Court ruled that the Constitution requires that forms of proof of paternity which are not unduly imprecise and burdensome must be allowed in intestacy proceedings in which the issue of the right of the illegitimate child to inherit from his/her deceased father is raised. As has been demonstrated above, there are several forms of proof of paternity, or combinations thereof, which

in view of their routine acceptance in the courts of New York State are sufficiently reliable, precise, and nonburdensome that they must constitutionally be considered in intestacy proceedings. Whatever may be the reach of the constitutional principles set forth in Trimble, it is unquestionable that application of those principles to the instant case compels a ruling in favor of the appellant Robert Lalli, since the undisputed proof of paternity offered by him comes within this Court's explicit examples of forms of proof which cannot constitutionally be eliminated by the State. Therefore, it is respectfully submitted that this Court should declare EPTL 4-1.2 (a) unconstitutional and reverse the order of the New York Court of Appeals

which is appealed from.

Dated: New York, New York
May 1, 1978

Respectfully submitted,



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